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No. 82-1521

In the Supreme Court of the United States

OCTOBER TERM, 1982

TAMARA FOODS, INC., PETITIONER
v.
NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board properly concluded that petitioner's employees were engaged in concerted activity protected by Section 7 of the National Labor Relations Act, 29 U.S.C. 157, when they walked out to protest the presence of ammonia fumes in their work area.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-27) is reported at 692 F.2d 1171. The decision and order of the National Labor Relations Board (Pet. App. A-28 to A-48) are reported at 258 N.L.R.B. 1307.

JURISDICTION

The judgment of the court of appeals (Pet. App. A-49) was entered on November 17, 1982. A petition for rehearing was denied on December 14, 1982 (Pet. App. A-50). The petition for a writ of certiorari was filed on March 11, 1983. This Court's jurisdiction is invoked under 28 U.S.C. 1254(a).

STATUTE INVOLVED

Relevant portions of the National Labor Relations Act (NLRA), 29 U.S.C. (& Supp. V) 151 *et seq.*, are set forth at Pet. App. A-51.

STATEMENT

1. Petitioner Tamara Foods (the Company) produces frozen onion rings and mushrooms for wholesale distribution. The freezers used in this process utilize ammonia as the refrigerant (Pet. App. A-29). Several times in early 1979 the freezer's cooling system developed leaks that released ammonia into the production areas outside the plant where about 50 employees worked. These fumes caused the employees to experience nausea, burning sensations in their noses and throats, headaches, tightness in their chests, and difficulty in breathing (Pet. App. A-41).

In response to an employee complaint about these leaks, the Occupational Safety and Health Administration (OSHA) conducted an on-site inspection at the plant on July 19, 1979. The on-site inspection revealed that there were no ammonia leaks at the time of the inspection but that there had been a leak or two before, which the Company had repaired. The inspection report indicated that there were low levels of ammonia in the plant atmosphere, that these levels were within OSHA's standards, but that ammonia levels could become high enough during a leak to cause irritation to employees. The report also noted that accurate measurement of the ammonia concentration resulting from a leak was difficult because the ammonia fumes would have dissipated by the time an OSHA inspector could get to the plant after a leak. Based on these factors, the OSHA inspector recommended that, as long as leaks continued, the Company should remove employees who experienced discomfort, at least until the vapors had dissipated (Pet. App. A-43; RX. 4).[1]

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[1] "RX." refers to exhibits introduced by the Company at the hearing before the Administrative Law Judge. "Tr." refers to the transcript of that hearing.

Leaks remained a problem during the next year. Often employees would be able to work through the duration of a leak, but at other times the employees would evacuate the production areas of the plant in accordance with rules promulgated by the Company. Under these rules, if employees decided to evacuate, the Company would continue to pay them at their normal rate until the leak was repaired and it was safe to reenter the plant; sick leave would be granted automatically upon request; but employees who clocked out before the end of the shift would be discharged (Pet. App. A-41). In response to further employee complaints about several alleged safety problems, including frequent ammonia leaks, OSHA conducted additional on-site inspections in early September 1980. The inspector found no violations of OSHA regulations and concluded that the Company's procedure for handling ammonia leaks and evacuation appeared to be adequate (Pet. App. A-43).

Shortly after the 7:00 a.m. shift started work on September 11, 1980, the employees began to smell ammonia. They continued to work, but the smell of ammonia became much stronger. After several minutes, most of the employees were feeling sick and some were gagging. The employees, on their own initiative, evacuated the production area and went to the cafeteria. Once in the cafeteria, the employees discussed how bad the leak was and how the ammonia made them nauseous and hurt their chests and throats. A few employees went outside to get fresh air (Pet. App. A-30, A-41).

Plant manager A.J. Schopp arrived at the plant shortly after the employees had evacuated the production area. About 45 minutes later, Supervisor Helen ("Lou") Bury came to the cafeteria and ordered the employees back to work. The employees returned to their work stations and found that the ammonia in the air was just as bad as it had been when they had left. For about ten minutes the

employees attempted to work, but the ammonia fumes were too strong and the employees again were forced to evacuate. Upon returning to the cafeteria, the employees again discussed how difficult it was to breathe in the plant and how the ammonia fumes had made them sick. Some of the more seriously affected employees went outside for fresh air (Pet. App. A-30 to A-42).

About ten or fifteen minutes after the employees evacuated the production area for the second time, Bury again directed the employees to return to work. One of the employees, Sharon Teuton, asked Bury if the ammonia smell was gone, and Bury assured her that it was (Tr. 29). The employees then returned to their work stations inside the plant, but found that the ammonia fumes were just as strong, if not stronger, than they had been before. The employees tried to work, but soon they began to feel the ill effects of the ammonia and were again forced to evacuate the production areas of the plant (Pet. App. A-30, A-42).

A number of employees decided to clock out, go home, and return the following morning after the Company had an opportunity to fix the leak (Pet. App. A-30; Tr. 31-32, 72, 101). As employee Anna Travis headed for the time clock, Bury asked her where she was going. Travis explained that the ammonia fumes were too bad to work and that she was going to clock out (Tr. 101). Bury then went to the cafeteria, where a number of employees were waiting in line to clock out. After ascertaining that the employees intended to clock out, Bury asked them to wait for plant manager Schopp to come speak with them (Pet. App. A-30; Tr. 32, 108).

The employees were waiting in the cafeteria when Schopp arrived a few minutes later. Schopp asked what they were doing, and the employees responded that they were clocking out to go home because the ammonia fumes were so bad

in the plant (Pet. App. A-30; Tr. 32, 70). Schopp said that the Company would not require them to work while the fumes were bad and that they could remain in the cafeteria until the leak was repaired (Pet. App. A-42). Employee Anna Travis asked Schopp why the employees should believe him after they had twice been sent back into the plant before the leak was fixed. Schopp responded that Travis' question was impertinent and told the employees that if they left they should not bother coming back the next day (Pet. App. A-31; Tr. 71, 109). An employee asked Schopp what he meant, and Schopp replied that anyone who clocked out should consider himself fired. Several employees who previously had clocked out then clocked back in (Pet. App. A-31). Eleven employees believed it likely that the Company would again require them to reenter the plant before the leak was repaired and that the only way to be sure the leak was fixed was to clock out and go home. These employees left the plant, and the Company discharged them (Pet. App. A-31; Tr. 49-50, 72, 88, 109).

2. The Board, overruling the Administrative Law Judge, found that the employees' walkout constituted concerted activity protected by Section 7 of the NLRA, 29 U.S.C. 157. The Board therefore concluded that the Company violated Section 8(a)(1) of the NLRA, 29 U.S.C. 158(a)(1), by discharging the employees who engaged in the walkout. The Board found that the walkout was rooted in the employees' concern over their repeated exposure to ammonia fumes and that Section 7 has long protected such employee efforts to protest what they perceive to be undesirable working conditions. The Board rejected petitioner's contentions that the protection of Section 7 is dependent upon the merits of the dispute, the reasonableness of the employees' choice of a method of protest, and the availability of alternative solutions to the employees' complaint. The Board also rejected petitioner's claim that the lack of a specific demand by the

employees removed them from the Act's protection, finding that the circumstances surrounding the walkout in this case adequately apprised the Company of the nature of the employees' concern. Finally, the Board held that the Company's unilaterally promulgated work rules did not curtail the scope of the protection afforded the employees by Section 7 (Pet. App. A-31 to A-34). The Board ordered petitioner to offer reinstatement to the discharged employees, to make them whole for the discrimination against them, and to post appropriate notices (Pet. App. A-34 to A-39).

3. The court of appeals affirmed, finding that the employees' concerns regarding the effects of repeated exposure to significant concentrations of ammonia fumes "were reasonable and objectively proven in light of the commonly known effects of exposure to ammonia" (Pet. App. A-23 to A-24); that despite repeated complaints by the employees about the ammonia leaks, the leaks "continued repeatedly until the walkout" (Pet. App. A-23); and that the employees' repeated complaints to OSHA and the events of the day of the walkout clearly had communicated to the Company "the desires of the employees for action" by the Company to eliminate the problem of recurrent leaks (Pet. App. A-24).

ARGUMENT

In *NLRB* v. *Washington Aluminum Co.*, 370 U.S. 9 (1962), this Court held that a work stoppage by a group of unorganized employees to protest the employer's failure to supply adequate heat in the plant was concerted activity protected by Section 7 of the Act. Petitioner contends that the situation here is distinguishable in that the employees were not engaged in concerted activities protected by Section 7 because the Company did not require the employees to work under hazardous conditions, but instead permitted them to "wait with pay" in the cafeteria. The Board and the court below properly rejected this contention.

1. As an initial matter, the facts here did show that the employees were justified in believing that petitioner was requiring them to work under hazardous conditions. As shown in the Statement, ammonia leaks were a recurrent problem at the plant for more than a year before the employee walkout. Each leak necessarily entailed at least some exposure to ammonia fumes, and frequently the concentrations were sufficient to cause the employees severe physical discomfort — including nausea, burning sensations in their noses and throats, headaches, and difficulty in breathing. On the day of the walkout alone, petitioner twice ordered the employees back into the plant before the ammonia leak was fixed and before the fumes had dissipated. As a result, the employees were exposed three times in less than two hours to the fumes. Thus, regardless of petitioner's "wait with pay" policy, work at the plant involved potentially hazardous exposure to the noxious chemical.

2. In any event, the fact that an employer has unilaterally adopted rules pertaining to particular working conditions does not diminish the employees' Section 7 rights to protest what they consider to be unsatisfactory aspects of those conditions. Irrespective of the particular work rule, such a protest remains within the coverage of the statutory phrase "concerted activities for the purpose of * * * mutual aid or protection" (29 U.S.C. 157). In *Washington Aluminum Co., supra*, 370 U.S. at 16-17, for example, the Court held that a plant rule requiring permission before leaving work could not override the employees' Section 7 rights to walk off the job to protest the inadequate heat in the plant. The Court further held that the employees did not lose the protection of Section 7 because their walkout might have been regarded by others as "unnecessary and unwise," since the employer "was already making every effort" to remedy the situation. The Court explained that "it has long been

settled that the reasonableness of workers' decisions to engage in concerted activity is irrelevant to the determination of whether a labor dispute exists or not" (*id.* at 16). Accordingly, even if petitioner, from its perspective, had "adequately addressed" the employees' concerns, as petitioner contends (Pet. 8), the employees nevertheless retained the right to express their dissatisfaction with the working conditions by walking off the job.[2]

3. This Court's decision in *Whirlpool Corp.* v. *Marshall*, 445 U.S. 1 (1980), in no way suggests a different result. There the Court approved a rule promulgated by OSHA that prohibits an employer from discriminating against an employee who in good faith refuses to perform work that he reasonably believes may cause death or serious injury. 445 U.S. at 4 n.3, quoting 29 C.F.R. 1977.12(b)(2). Unlike Section 7 of the Labor Act, the purpose of the OSHA regulation is not to protect concerted activities as such; it instead is designed to protect employees in situations in

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[2]The Second Circuit's recent decision in *NLRB* v. *Hudson T. Marsden*, No. 82-41-1 (Feb. 23, 1983), is not to the contrary. The court in that case explicitly adhered to the principle of *Washington Aluminum* that the reasonableness of the goals of the employees' concerted activities is not for the Board or courts to determine (slip op. 1965). In *Marsden*, the construction employees decided to stop working one day because of a light rain, even though they had done nothing to make their employer aware of any complaint about their working conditions. The court held that, in these circumstances, the walkout was unprotected by Section 7, because it was unaccompanied by any demand by the employees — whether before, after, or at the same time as the concerted activities (slip op. 1963-1966). Here, however, petitioner was well aware of the employees' concerns about exposure to ammonia fumes, and indeed petitioner does not contend that it did not know the nature of the employees' protests. As shown in the Statement, the employees had repeatedly complained to OSHA about that exposure, and, on the day of the walkout, they had expressly communicated their displeasure over the fumes to management personnel. See *NLRB* v. *Washington Aluminum Co.*, *supra*, 370 U.S. at 14-15.

which the scheduling of an on-site inspection by OSHA personnel cannot be arranged before the employee is exposed to conditions that could cause death or serious injury; accordingly, the regulation applies even to a single employee's refusal to work in the face of hazardous conditions. See 445 U.S. at 8-11.

Contrary to petitioner's apparent suggestion (Pet. 6-7), neither the regulation at issue in *Whirlpool* nor the Occupational Safety and Health Act itself (29 U.S.C. 651 *et seq.*) supplants the protection afforded employees' concerted activities by Section 7 of the NLRA. To the contrary, this Court made clear in *Whirlpool* that "the law then [when the Occupational Safety and Health Act was passed], *as it does today*, already afforded workers a right, under certain circumstances, to walk off their jobs when faced with hazardous conditions," including the right "[u]nder Section 7 [of the NLRA] * * * to strike over safety issues" (445 U.S. at 17-18 n.29 (emphasis added)). Indeed, the Court in *Whirlpool* cited *Washington Aluminum* for the proposition that there is a right under Section 7 "to strike over safety issues" (445 U.S. at 18 n.29). And, the Court cited *Washington Aluminum* for this proposition even though there is no indication that the employees who walked off to protest the cold working conditions in that case were confronted with working conditions that could have caused death or serious injury or, therefore, that they would have been entitled to the separate protection of the OSHA regulation involved in *Whirlpool* if it had been in effect at the time. Thus, as the Court recognized in *Whirlpool*, the OSHA statute and the regulations issued under it were intended to supplement, rather than displace, the protection afforded employees by the Labor Act.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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